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Post's Brief Against Barring Series

Memo Cites Government's Burden In a First Amendment Case

Following is The Washington Post's trial memorandum submitted in U.S. District Court:

It is hornbook law that in any case—even a case in which no constitutional principles are at stake—plaintiff may not obtain the extraordinary remedy of a preliminary injunction unless it can establish to the satisfaction of the court not only that it will probably succeed at the final hearing, but also that the failure to grant such relief will result in grave and irreparable injury to it. See, e.g., Industrial Bank of Washington v. Tobriner, 405 F. 2d 1321 (D.C. Cir. 1968); Young v. Motion Picture Association of America, Inc., 299 F. 2d 119 (D.C. Cir. 1962). Where, as here, First Amendment rights are concerned the government bears a far greater burden than normal. For in such a case, the balance is always weighted in favor of free expression, and this is particularly true where the proposed infringement involves a prior restraint (Liberty Lobby, Inc. v. Pearson, 390 F. 2d 489 (D.C. Cir. 1968." Thus, in formulating the issue to be tried on remand, the Court of Appeals imposed on the government the burden of showing that publication of the material here complained of "would *so* prejudice the defense interests of the United States or result in *such* irrepable injury to the United States as would justify restraining the publication thereof . . . See Near v. Minnesota, 283 U.S. 697, 715-16 (1931)." (Emphasis added.)

Clearly, a showing of *some* prejudice to the interests of the United States or *some* irreparable injury is insufficient. The prejudice must be so extraordinary and the irreparable injury so great as to justify this unprecedented infringement on First Amendment freedoms.

What, then, must the Government actually show to prevail at this hearing? The answer to that question, we suggest, must be determined with reference to those types of injury referred to in that portion of Near v. Minnesota to which the Court of Appeals has specifically directed our attention.*

The Near case (283 U.S. at 716) speaks of "actual obstruction" to the government's "recruiting service," the "publication of the sailing dates of transports," or "the number and location of troops." We recognize, of course, that this list is not all-inclusive, but it is nevertheless indicative of the type of injury which the government here must show. To succeed, the government must establish that the publication of the material here at issue would result in a serious, immediate and substantial threat to its ability to wage war, imminent risk of death to American military personnel, or a grave breach of the national security. As noted by Judge Gurfein in the New York Times case, the issue is whether publication will result in "*serious* security breaches *vitally* affecting the interest of the Nation." (Emphasis supplied.) Embarrassment to United States and foreign statesmen and politicians, on the other hand, cannot support the issuance of such unprecedented relief any more than it could justify the historically and judically discredited Alien and Sedition Acts. See New York Times Co. v. Sullivan, 376 U.S. 254, 276, et seq.

We are, of course, not yet privy to the government's case. But the probable result of the government's proof is already clear. Judge Gurfein, after an extensive *in camera* hearing which allowed the government full latitude to develop its evidence, failed to find anything more than that the historical report contained documents which were years old and which, if published, would in no way jeopardize the defense or foreign relations interests of the United States, albeit publication could demonstrate an embarrasing disparity between the private and public acts and thoughts of some high former officials. Judge Gurfein said:

"This Court does not doubt the right of the Government to injunctive relief against a newspaper that is about to public [sic] information or documents absolutely vital to current national security. But it does not find that to be the case here. Nor does this Court have to pass on the delicate question of the power of the President in the absence of legislation to protect the functioning of his prerogatives—the conduct of foreign relations, the right to impartial advice and military security, for the responsibility of which the Executive is charged against private citizens who are not government officials. For I am constrained to find as a fact that the *in camera* proceedings at which representatives of the Department of State, Department of Defense and the Joint Chiefs of Staff testified, did not convince this Court that the publication of these historical documents would seriously breach the national security. It is true, of course, that any breach of security will cause the jitters in the security agencies themselves and indeed in foreign governments who deal with us. But to sustain a preliminary injunction the Government would have to establish not only irreparable injury, but also the probability of success in the litigation itself. It is true that the Court has not been able to read through the many volumes of documents in the history of Vietnam, but it did give the Government an opportunity to pinpoint what it believed to be vital breaches to our national security of sufficient impact to controvert the right of a free press. Without revealing the content of the testimony, suffice it to say that no cogent reasons were advanced as to why these documents except in the general framework of embarrassment previously mentioned, would vitally affect the security of the Nation. In the light of such a finding the inquiry must end."

In a statement appearing in the Sunday edition of The Washington Post (page A15), the President's press secretary suggested that the chief areas of the government's present concern involved the continued ability of governments to deal with one another on a confidential basis and the ability of presidential advisers to speak and write candidly. While these matters are of legitimate concern to the government, we note that Judge Gurfein specifically found that they were not here involved.

We do not know what different or additional evidence the government will introduce in these proceedings, but it is clear that, if such evidence centers about [illegible] with the President's press secretary has adverted, they are

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* We do not concede that the Court of Appeals' reading of Near v. Minnesota is correct. We believe that the reading of Near accorded by this Court is more fundamentally in accord with modern First Amendment concepts, which, at the time Near was decided, had not been fully developed or articulated. The landmark case of New York Times Co. v. Sullivan (376 U.S. 254) and its progeny, including, most recently, the decision of the Supreme Court in Rosenbloom v. Metromedia, Inc. (39 U.S.L.W. 4694 June 7, 1971), were still 20 to 30 years in the future. It is obvious that many of the examples referred to in Near v. Minnesota as properly enjoinable could not now constitutionally be enjoined. We recognize, however, that this Court and we are bound, at this stage of these proceedings, by the "ground rules" prescribed by the Court of Appeals. At the appropriate time and in the appropriate forum, the defendants intend to assert that the Restraining Order and temporary restraining order was unconstitutional, in the light of the vague and conclusory showing made by the Government in support of its application.

clearly insufficient to justify suppression of First Amendment freedoms. We note, in this connection, that governments themselves officially publish, "leak" or otherwise disseminate supposedly confidential communications from other governments when it suits their purpose; and it is so well known as to be an appropriate subject of judicial notice that advice given to the President by his advisers is, with astonishing regularity, leaked to the national news media. We respectfully submit that the legitimate governmental concerns with respect to such matters can best be served by increased vigilance within the Executive Department, and not by suppression of First Amendment rights after the material has been widely disseminated to persons outside the government.

Having embarked on a course of censorship unparalleled in the history of the Republic, the government now seeks to frustrate the very judicial process which it has itself invoked. It insists upon a hearing *in camera*, under procedures which would severely circumscribe defendants' rights to defend themselves.

Much of the so-called "secret information" has already been published. The government claims it has thereby already been irreparably injured. Before this court shrouds this proceeding in secrecy, the government at the very least, should be required to prove in public the nature and degree of the harm it claims it has already sustained. Especially in the light of Judge Gurfein's holding, unless the government can demonstrate for all to see that what has already been published has indeed jeopardized this nation's security, there can be no justification for the secrecy the government now demands.

Any attempt to invoke secrecy here will create a precedent which, once established, will be expanded to a variety of evolving circumstances claimed to relate to the "national security" or whatever other governmental interests are asserted to justify preclusion of public scrutiny. The preservation of a fair and impartial judi-

most jealous resistance to every such encroachment upon the judicial process.

The foregoing considerations may appear doctrinaire, but, in truth, they lie at the core of our freedom. This case does not involve the trade secrets of private parties or delicate family relationships, which concededly bear no relationship to the commonweal. This is not a case in which the government seeks to keep information secret by surrendering the right to use such evidence itself. To the contrary, this case bears directly on the political process at the highest level, an attempt by our government to censor the dissemination of information which is vital to an informed electorate. This proceeding, then, should take place in the open, not in secret, and resolution of the competing interests should be made on the basis of evidence which all may examine, not on evidence which is sealed and impounded.

Heine v. Raus 261 F. Supp. 570 (D. Md. 1966), vacated, 399 F. 2d 785 (4th Cir. 1968), on remand, 305 F. Supp. 816 (D. Md. 1969), affirmed, 432 F. 2d 1007 (4th Cir. 1970), cert. denied (April 19, 1971), the case upon which the government has stated it would principally rely, does not, in fact, support its position. In Heine, the government had not invoked the judicial process and, indeed was not even a party to the litigation. Whatever may be the rights on the government under the "state secrets doctrine" where it is a non-party witness, it cannot invoke that doctrine where it is a party to the litigation and, particularly, when it is the plaintiff. Applicable here is the holding of Alderman v. U.S., 394 U.S. 165, 191, where the court noted with approval the government's concession that:

> ". . . disclosure must be made even though attended by potential danger to the reputation or safety of third parties or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information."

No matter how appropriate may be the final result of an *in camera* hearing,

to what occurred behind closed doors will supplant that certainty which a public hearing assures to the integrity of the judicial process.

There are also immediate, practical considerations of vital importance to the defendants in this case. If defense counsel is effectively to serve these defendants, he must be free to cross-examine and rebut, where possible, the evidence adduced by the government. To do so effectively, counsel must be allowed to have at his side or freely available to him persons with knowledge and qualifications sufficient to assist him to evaluate the government's testimony — persons who can supply material for cross-examination and who can, where necessary, take the stand to refute what the government offers. How can counsel for defendants obtain witnesses, or even seek out and interview potential witnesses, when the testimony is offered in secret, and when defense counsel is not even permitted to discuss such testimony with the potential witness? In such circumstances, defense counsel could not even determine whether the proposed witness has the requisite testimonial knowledge.

In summary, whatever burdens an open trial may impose upon the government are vastly outweighed by the burdens — constitutional, legal and practical — which a secret trial would impose, not only upon the defendants, but the American people, as well. In this case, in which the government seeks to impinge upon First Amendment freedoms, defendants' counsel should be afforded the greatest of latitude and assistance in the preparation of the case. They should not be forced to trial under handicaps which a secret trial would necessarily entail.

In the limited time available to us, we have reviewed the government's trial memorandum. We note that it is largely devoted to a discus-

sion of abstract principles which have no real relationship to the questions presented by this case, and a discursive discussion of Section 793 which is essentially irrelevant to the issue presently before the Court and contrary to the express holding of Judge Gurfein in the New York Times case. These matters have been briefed exhaustively in New York Times or discussed in Judge Gurfein's opinion, and need not here be reargued. There is, however, one point to which we believe the court's attention should be directed, namely, the government's contention that the classification of a document by the Executive is controlling upon this court, absent a finding that such classification is arbitrary and capricious. Nothing could be further from the fact. We are here concerned with a constitutional case. The question is whether a prohibition on publication of the documents here at issue constitutes a violation of the First Amendment. The use of labels—even the label "Top Secret-Sensitive" by the government—does not relieve this court of its duty to determine independently, on the basis of all the facts adduced, whether the injunction the government seeks would impinge upon defendants' First Amendment rights.

Under our constitutional system the courts are the ultimate guardians of these fundamental First Amendment rights. It is the judiciary not the Executive which has the right, indeed the duty, independently to examine the evidence to determine whether the granting of an injunction would in fact abridge constitutional protections. Wood v. Georgia, 370 U. S. 375, 386 (1962); Craig v. Harney, 331 U. S. 367 (1947); Norris v. Alabama, 294 U. S. 587 (1935).

As was said in NAACP v. Button, 371 U. S. 415, 429 (1963):

> ". . . a State cannot foreclose the exercise of constitutional rights by mere labels."

As stated by the Supreme Court in New York Times Co. v. U.S., 376 U.S. 254, 285:

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"This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' Speiser v. Randall, 357 U.S. 513, 525 2 L ed 2d 1460, 1472, 78 S Ct. 1332. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' Pennekamp v. Florida, 328 U.S. 331, 335, 90 L ed 1295, 1297, 66 S Ct. 1029; see also One, Inc., v. Olesen, 355 U.S. 371, 2 L ed 2d 352, 78 S Ct. 364; Sunshine Book Co. v. Summerfield, 355 U.S. 372, 2 L ed 2d 352, 78 S Ct. 365. We must 'make an independent examination of the whole record,' Edwards v. South Carolina, 372 U.S. 229, 235, 9 L ed 2d 697, 702, 83 S Ct. 680, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."

The only justification for continuing this proceeding is the government's claim that publication of as yet unpublished material will result in irreparable injury to it. Yet, as a result of Judge Gurfein's decision, before this hearing is concluded The New York Times may be legally free to resume publication of its series. If this should occur, it would be manifestly inequitable to continue the temporary restraining order or to grant a preliminary injunction. Continuation of the restraint could then serve no conceivable purpose except to injure irreparably The Washington Post, and deprive its readers of information freely available to everyone else throughout the world. See, e.g., City of Montgomery, Ala. v. Gilmore, 277 F. 2d 364, 368 et seq. (5th Cir. 1960); Grand Union Equipment Co. v. Lippner, 167 F. 2d 958 (2d Cir. 1948). If such circumstances should occur, defendants will immediately move to dissolve any restraint upon The Washington Post's freedom to publish.